Labor Management Relations Act, 1947

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Section 8: Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginnng of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender

the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a) of this title.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 237

L. J. WILLIAMS, d/b/a L. J. WILLIAMS LUMBER COMPANY and ADA W. WILLIAMS, d/b/a VARNVILLE WOOD PRODUCTS COMPANY, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 156-161) is reported at 195 F. 2d 669. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1-50) are reported at 93 NLRB 1672 and 96 NLRB 635.

JURISDICTION

The judgment of the court below was entered on April 1, 1952 (R. 162). A petition for rehearing filed by petitioners on April 30, 1952 (R. 163-166), was denied on May 10, 1952 (R. 167-168). The petition for a writ of certiorari was filed on July 30, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings, sustained by the court below, that petitioners violated Section 8(a)(1), (3), and (5) of the Act, by interrogating, spying upon, and threatening their employees because of their union activities, by discharging or otherwise discriminating against three of their employees, and by refusing to bargain with the certified representative of their employees in a unit found appropriate by the Board.

2. Whether interrogation of employees concerning their union activities, surveillance of such activities, and threats of economic reprisal to discourage union membership are protected by the First Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 16-20.

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board issued its Decision and Order in which it found that petitioners had violated Section 8(a)(1), (3), and (5) of the Act, and directed the usual remedy appropriate for such violations. The facts, as found by the Board and shown by the evidence, may be summarized as follows:

A. The Facts As Found by the Board

1. The Refusal to Bargain

On July 20, 1949, Plywood and Veneer Workers Local Unions No. 3130 and 3135, United Brotherhood of Carpenters and Joiners of America, A. F. L., herein called the Union, filed a petition with the Board for certification as exclusive bargaining representatives of the employees of both petitioners in a single bargaining unit (R. 28; 61, 77).[1] At the representation hearing held pursuant to this petition, petitioners urged that their respective employees should appropriately be grouped in separate units (R. 28; 78). The evidence at the hearing revealed the following:

L. J. Williams is the owner and manager of the Williams Company and is also manager of the Varnville Company, which is owned by his wife,

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[1] Wherever in a series of references a semicolon appears, references preceding the semicolon are to Board findings; succeeding references are to the supporting evidence.

Ada W. Williams (R. 32; 129).[2] At the time of the representation hearing, Williams' plant consisted of three buildings and Varnville's plant consisted of five (R. 32; 130). All of these buildings were located on a single tract of land and, together with their machinery and equipment, were owned by Ada Williams (R. 32; 129-130). The waste lumber from the Williams Company operations provided the fuel required for the steam boilers which were used by both companies, and was regarded as rent paid for Williams' use of the Varnville plant, machinery, and equipment (R. 32; 138-139). There were no other exchanges of materials between the two companies (R. 32; 132).

The two companies shared a single office building as well as a single heat and steam plant (R. 32; 130-131). They jointly employed a head bookkeeper and each paid one-half of his salary (R. 32; 131). The assistant bookkeeper was employed and paid by Williams but spent about 10 percent of his time working for Varnville (R. 32; 131, 135). The wages of the firemen who fired the boilers and of the watchmen and saw filer were paid by the two companies in equal shares (R. 32; 134-136).

Each company was under the general supervision of L. J. Williams, but each had its own superin-

[2] Williams conveyed the Varnville Company to his wife about 1940 or 1941 to effect savings in income taxes and to avoid difficulties with the Wage and Hour Administration (R. 34; 118, 119, 125, 137). Ada W. Williams takes no part in the actual operation of the company (R. 55).

tendent who was in charge of all day-to-day operations including the hire and discharge of employees (R. 32; 131-132, 136). Each superintendent paid the employees under his direction with funds drawn upon a joint account carried by the two companies, the checks being countersigned by the head bookkeeper (R. 32-33; 139-140). Except for the persons whom the two companies employed in common, there was no interchange of employees (R. 33; 137).[3] Apart from bookkeeping problems, however, there was no functional reason for not permitting interchange inasmuch as the bulk of the employees were unskilled, and the rates of pay and other conditions of employment were the same in both companies (R. 33; 121, 132). Indeed, petitioner L. J. Williams described the nature of the separation of the two companies by saying that he "drew a theoretical line down the middle of the mill and one side was leased and devoted to the pine [the Williams Company] and the other to the Varnville Wood Products Company" (R. 119).

Upon the foregoing facts the Board found that the production and maintenance employees of both companies could appropriately be joined in a single bargaining unit, and directed an election. A majority of the employees voting in the election de-

[3] Employees were not loaned back and forth principally because each superintendent was paid a salary plus a percentage of the profits from his operation; this arrangement made it necessary that the finances of each company be kept as separate as possible (R. 136-137).

signated the Union as their exclusive bargaining representative and the Union was certified (R. 28-29; 61). Notwithstanding the certification, petitioners admittedly refused and still refuse to bargain with the Union, urging only that the Board's unit determination was improper (R. 29; 57, 61-62, 73, 77-79).

In the hearing held pursuant to unfair labor practice charges and resulting in the order enforced by the court below, petitioners adduced additional evidence to show that a single bargaining unit was inappropriate (R. 33, 58, 72-73). They showed that some time after their refusal to bargain, the Williams Company began to move its manufacturing operations into a new plant which it was building on a tract of land three-quarters of a mile from the Varnville plant (R. 33; 58-59). Construction of the new plant had not been completed at the time of the unfair practice hearing and the Williams Company continued to use the dry kiln at the Varnville plant (R. 33; 58-59). Except for a few minor items, the new plant was equipped with machinery moved from the old plant (R. 33; 76). The record contains no evidence of payment by the Williams Company for this machinery which was owned by Varnville (R. 33).

The logging crew which at the time of the representation hearing was on Varnville's payroll was on Williams' payroll at the time of the unfair labor practice hearing (R. 60, 112, 133). This change, however, was consistent with petitioners' estab-

lished practice of making the payroll assignment of the logging crew dependent on whether it was engaged in logging pine or in logging hardwood (R. 119-120).

In other respects, the operations of the two companies remained the same. All logs were delivered to the one sawmill which was located on the Varnville site (R. 34; 120). After the logs were sawed, Varnville took the hardwood; the pine lumber, which constituted the bulk of the stock, was assigned to the Williams Company, which was charged therewith (R. 34; 120-121). The two companies continued to operate from a joint bank account and to share the cost of the head bookkeeper who "correlates" the two operations (R. 122).

Upon the foregoing facts the Board, like the trial examiner, concluded that the changes in petitioners' operations since the time of the representation hearing did not invalidate the original unit determination (R. 10, 35).

Accordingly, the Board found that petitioners' refusal to bargain on February 9, 1950, and thereafter, was wrongful[4] and constituted a violation of Section 8(a)(5) of the Act (R. 10, 35).

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[4] Petitioners expressly agreed at the hearing that if the unit found by the Board was appropriate, they would admit their refusal to bargain (R. 78-79).

2. Petitioners' Interference, Restraint, and Coercion

In the course of the Union's organizational campaign, petitioner L. J. Williams, acting on behalf of both petitioners, admittedly interrogated a number of the employees concerning their union membership and asked "what went on" at union meetings (R. 29; 74). Williams also testified that he asked employee James Henderson "to attend these meetings" and "let him know what was being said" (R. 31; 74, 117). During the same period Williams informed his woods crew that if the men joined the Union he would "shut the place down" by firing the employees one by one, with the union members being the first to go (R. 30; 67-68, 69). On other occasions Williams warned the employees that, if the Union won the election, certain financial aid he had given them in connection with their jobs or in connection with other problems would stop (R. 29-30; 66-67, 81, 90, 95-96). He advised his "friends" not to vote in the Board election, pointedly reminding them of his past favors (R. 30; 67). Finally, after the Union had won the election, he tried, through similar pressures, to thwart the Union's effort to form a bargaining committee (R. 30, 31; 67, 63-64).

3. Petitioners' Discriminatory Treatment of Employees Henderson, Miller, and Hill

As already noted, petitioner L. J. Williams assigned employee Henderson to spy upon the Union (R. 31; 74, 117). Williams was admittedly cha-

grined at the way Henderson carried out his assignment and, when he saw Henderson go to vote in the Board election, knew that Henderson had "gone against" him (R. 40; 100). Williams testified that to "get back on" Henderson, he discontinued paying Henderson for transporting employees to and from work (R. 40-41; 117). On the same day, January 12, 1950, Williams notified Henderson that he had one week to move from a house which Williams had theretofore permitted him to occupy rent-free (R. 41-42, 97).[5]

On Otober 26, 1949, petitioners discharged employees Miller and Hill, allegedly because petitioners no longer required their services (R. 37-38; 75, 106-107). Miller and Hill were a team of two in the woods crew which had been summoned to hear Williams state his opposition to the Union (R. 36; 79-80, 82-83, 88-89). At that time Williams pointed to Miller as one who knew all about the Union's organization effort (R. 37; 83, 115). Notwithstanding Miller's denial, Williams continued to regard him as a leader in the Union's organizational campaign and addressed him as "Joe Miller, the big Union man" (R. 30, 37; 84, 90, 115-116). Williams also, after having made a loan to Miller, openly announced that, if he had known of Miller's joining the Union, he would not have made the loan

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[5] A number of employees were allowed by Williams to live in rent-free houses (R. 42; 65-66). This was one of the benefits Williams had threatened to withdraw if the Union won the election (R. 29-30; 66-67, 95-96).

(R. 37; 90). Finally, on the Saturday before the discharge of Miller and Hill, Williams asked employee Loyd Allen, Miller's son-in-law, whether Miller and Hill had attended union meetings (R. 37; 102-103). Allen replied that Miller had done so, but he did not know about Hill (R. 37; 103).

About noon on the following Wednesday, Foreman Wynn told Miller and Hill they were fired because he had to "cut off the machine" on which they were working or "run it himself" (R. 38; 85, 90-91).[6] In answer to their inquiries, Wynn told both employees there was nothing wrong with their work (R. 38; 85, 90-91). Wynn told Miller and Hill he would recall them if they were needed, but added "don't wait on me if you can find a job" (R. 11, 38; 111). At the hearing, however, Wynn admitted that he "had no intentions" of rehiring Miller, and Miller was never recalled although the size of the woods crew was increased in February 1950 (R. 13; 111, 109). Hill, on the other hand, was offered his job back a few weeks after the discharge and was told that he had been fired because petitioners were "going to lay Miller off and he [Hill] was with Miller" (R. 13; 108).

B. The Board's Conclusions and Order

Upon the foregoing facts, the Board concluded that petitioners' refusal to bargain with the Union constituted a violation of Section 8(a)(5) and (1)

[6] On the next day, however, petitioners hired a new employee who, together with Foreman Wynn, operated the skidder which Miller and Hill had been running (R. 11-12, 38; 107, 126).

of the Act. In so holding, the Board rejected petitioners' sole defense for its admitted refusal to bargain, namely, that a grouping of the employees of both petitioners in a single bargaining unit was inappropriate. The Board affirmed its prior holding in the representation proceeding that "In view of the close proximity and single ownership of plants and equipment, and the common over-all management of both businesses, together with the joint employment of some employees within the unit, we find that the employees of the two companies may appropriately be joined in a single bargaining unit" (R. 28). The Board ruled further that the single change which had occurred in petitioners' operations since the time of the representation hearing, *i.e.*, the removal of the Williams Company operations to a location about three-quarters of a mile distant from its former site, did not invalidate the original unit determination. The Board held that the mere physical separation of the two plants by a distance of less than a mile, in a context where the separation of operations had no functional basis but was devised and continued merely to meet management's private purposes with regard to tax relief and Wage-Hour problems, did not render a single bargaining unit inappropriate, especially since the employee representatives of both companies would be dealing with L. J. Williams even if separate units were found appropriate (R. 10, 34-35).

The Board concluded further that petitioners' interrogation, surveillance and threats of economic

reprisal, proved by their own admissions or by virtually uncontradicted testimony, violated Section 8(a)(1) of the Act (R. 9, 31). Finally, the Board held that petitioners' defenses for the discriminatory treatment of Employees Henderson, Miller, and Hill were without merit. Petitioners admittedly penalized Henderson because of his "shortcomings as a labor spy" (R. 2, 14-15). Similarly, Miller was discharged because of his known Union activity, consistent with petitioner Williams' prior warning that he would "shut the place down" by firing the employees one by one, beginning with Union members. Hill, as the other member of Miller's two-man team, became the "innocent victim of [petitioners'] unfair labor practices directed at Miller" (R. 12-13). Accordingly, the Board concluded that petitioners' conduct with respect to all three employees was violative of Section 8(a)(3) and (1) of the Act (R. 2, 12-13, 14-15, 39).

The Board ordered petitioners to cease and desist from the unfair labor practices found, to bargain with the Union upon request, to provide reinstatement and back pay as appropriate to the employees discriminated against, and to post the usual notices (R. 45, 16-18).

C. The Decision of the Court Below

The court below affirmed the Board's findings that petitioners had violated Section 8(a) (1), (3), and (5) of the Act and enforced the Board's order in its entirety. The court held that substantial

evidence supported the Board's findings that petitioners had engaged in unlawful interference and had unlawfully discriminated against employees Henderson, Miller and Hill. It concluded that petitioners' factual defenses to the discrimination found did not "hold up" (R. 160-161), and that the First Amendment provided no defense for petitioners' "obviously intimidating conduct" (R. 160). Applying the tests laid down by decisions of this Court as well as its own decisions, the court further concluded that the Board's determination that a single bargaining unit was appropriate comported with the statutory standards and was neither unreasonable nor arbitrary (R. 157-160).

ARGUMENT

The petition poses no question of general importance in the administration of the Act, and the arguments petitioners advance are decisively refuted by the opinions of the Board and the Court of Appeals. We submit that there is no basis in this case for the granting of certiorari.

Petitioners' challenge to the substantiality of the evidence, described by the court below as "ample," manifestly does not warrant review.[7] Moreover,

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[7] Petitioners' claim (Pet. 2, 6) that the Board's order requiring them to reinstate and reimburse the three employees discriminated against violates their "rights under the Fifth Amendment" is predicated solely on the contention that the evidence was insufficient to sustain the finding of discrimination. Apart from the fact that the evidence was plainly

as the Statement shows (pp. 3-10, *supra*), the findings are clearly correct.

Petitioners' contention (Pet. 2, 4-5) that the First Amendment protects their interrogation, surveillance, and threats of reprisal is patently unsubstantial. As the court below stated, freedom of speech under the First Amendment "can in no way be construed as a cloak to hide obviously intimidating conduct" (R. 160). None of the cases relied upon by petitioners (Pet. 4-5) can be read as suggesting anything to the contrary.

Finally, petitioners argue that the Board's determination that a single bargaining unit was appropriate is "arbitrary and unreasonable and unsupported by the evidence" (Pet. 6). This argument, essentially factual in nature, is destroyed by the record (see pp. 3-7, *supra*), which plainly sustains the finding that petitioners' intermingled, commonly managed companies constituted an appropriate bargaining unit.

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sufficient, it scarcely requires extended discussion to show that erroneous findings by the Board and the court below would present no question under the Fifth Amendment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 141, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be

conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opin-

ion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuits courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record of the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such

temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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